Supreme Court, U.
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No. 89-1835

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1989

KELVIN H. KEITH,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PAN AMERICAN WORLD AIRWAYS, INC.,
CERTAIN CLAIMANTS, MORGAN D. KING,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether a settlement agreement entered into between Respondents Pan American World Airways, Inc. ("Pan Am") and the Equal Employment Opportunity ("EEOC"), on behalf of Certain Claimants, arising out of an enforcement action brought against the former pursuant to the Age Discrimination in Employment Act violated due process, where no notice of the enforcement action was sent to, or received by, a large number of persons who were known by the EEOC to have been victims of Pan Am's purported discrimination and where the notice that was sent did not inform recipients that the EEOC's ADEA-enforcement action terminated the recipient's rights to bring an individual suit for relief under the ADEA.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iii
REPLY TO RESPONDENTS' STATEMENTS CONCERNING JURISDICTION AND PARTIES.	1
REPLY TO RESPONDENTS' STATEMENTS OF THE CASE.	3
REPLY TO RESPONDENTS' REASONS FOR DENYING/GRANTING THE WRIT	11
CONCLUSION.	20

TABLE OF AUTHORITIES

Cases	Page(s)
Atkins v. Parker, 472 U.S. 115 (1985).	19,20
EEOC v. Eastern Air Lines, 97 F.R.D. 646 (S.D. Fla. 1983) . . .	13
Graver Tank & Mfg. v. Linde Air Products, 336 U.S. 271 (1949).	5
Martin v. Wilks, —— U.S. ——, 109 S. Ct. 2180 (1989)	18
Texaco, Inc. v. Short, 454 U.S. 516 (1982).	20
Tulsa Professional Collection Services, Inc. v. Pope, —— U.S. ——, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988).	9
United States v. Reliable Transfer Co., 421 U.S. 397 (1975).	5

Court Rules	
Fed. R. Civ. P. 23.	17,18
Sup. Ct. Rule 12.2.	2
Sup. Ct. Rule 12.4.	2
Sup. Ct. Rule 37.	1

REPLY TO RESPONDENTS' STATEMENTS CONCERNING JURISDICTION AND PARTIES

Citation herein to Respondents' briefs shall be as follows: (EEOC at p. ___); (PAN AM at p. ___); (CLAIMANTS at p. ___); (KING at p. ___).

Respondents PAN AM and CLAIMANTS dispute the propriety of Respondent KING having filed a brief responding to and supporting the Petition. (PAN AM at pp. ii, 1); (CLAIMANTS at pp. ii, 6-7). They contend that KING's brief is "wholly unauthorized" (PAN AM at p. 1), because it was not filed within the time for KING to have filed his own Petition for Writ of Certiorari, and was not authorized as an amicus brief pursuant to Rule 37. (Id.; CLAIMANTS at pp. 6-7). This contention is patently incorrect; KING's brief does not have to be filed as an amicus brief because KING is a party to these proceed-

ings, and amicus briefs are filed by non-parties.

While KING clearly could have filed his own Petition for Writ of Certiorari pursuant to Supreme Court Rule 12.2, he nevertheless was properly named as a Respondent by Petitioner and his brief in that capacity is completely proper and specifically allowed by the rules of this Court. Supreme Court Rule 12.4 states:

> .4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of the notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of an intention to remain a party. All parties other than petitioners shall be respondents, but any respondent who supports the position of a petitioner shall meet the

> time schedule for filing papers which is provided for that petitioner, except that a response to the petition shall be filed within 20 days after its receipt, and the time may not be extended.

(Emphasis supplied.) KING's response was specifically authorized by this Court's rules and timely filed thereunder.

Petitioner agrees with the arguments set forth in KING's response, and adopts them as his own. Accordingly, Petitioner will not discuss those arguments in detail in this Reply Brief.

REPLY TO RESPONDENTS' STATEMENTS OF THE CASE

The briefs of PAN AM, CLAIMANTS, and the EEOC all set forth the same argument in different language, and repeatedly so. As stated by PAN AM (at p. 14), Respondents' argument is that Petitioner "showed no interest" in the instant suit, "despite

having received actual notice" thereof. Petitioner must note that it is impossible for one to "show interest" in that of which he has no knowledge, and correct PAN AM's erroneous assertion that Petitioner no longer denies receiving actual notice of the instant suit. (PAN AM at p. 16).

Petitioner still denies receiving actual notice of the instant suit until the settlement was announced. Respondents attempt to transform the "two-court rule" into an absolute bar to this Court's review of any factual findings below, no matter how flimsy the evidence presented or clearly erroneous the finding. For example, CLAIMANTS state incorrectly that factual findings made by the lower courts concerning Petitioner and Respondent KING's knowledge "are not now contested by Keith or King," and continue "Even if they

were contested, they are not to be re-examined by this Court." (CLAIMANTS at p. 18, emphasis supplied), citing, United States v. Reliable Transfer Co., 421 U.S. 397, 401 n.2 (1975).

The case cited says nothing of the sort. It merely states that on the record presented, the "heavy burden under the two-court rule" could not be met. United States v. Reliable Transfer Co., 421 U.S. 397, 401 n.2 (1975). Similarly, PAN AM claims the two-court rule "would make such findings virtually irrebuttable," (PAN AM at p. 16, n.4, emphasis supplied), citing, inter alia, again to United States v. Reliable Transfer Co., supra. PAN AM also cites Graver Tank & Manfacturing v. Linde Air Products, 336 U.S. 271, 275 (1949), yet admits that case recognizes an exception to the "two-court rule" wherever

there is "a very obvious and exceptional showing of error." (PAN AM at p. 16-17, n.4).

This exception to the "two-court" rule applies here. Since the EEOC chose to purportedly send its single notice of the instant enforcement suit by regular mail, rather than registered or certified mail, it did not, and could not, actually present any direct evidence that anyone, let alone Petitioner, actually received the notice. All the EEOC could provide was a generalized statement that the persons on the list provided by PAN AM had been sent its two-paragraph, one-page letter. See, Petition for Writ of Certiorari, Exhibit B at p. 88 (Opinion of the District Court at 22). After that, the lower courts relied on the presumption that all the addressees, including Petitioner (but not in-

cluding other class members not included on the PAN AM list, such as Respondent KING), must have received the notice merely because it had been mailed.

Reliance on the presumption of receipt of a mailed letter of course made it impossible for Petitioner to prove the fact of his non-receipt. As applied by the lower courts, the presumption requires proof of a negative, and essentially amounts to an irrebuttable presumption depriving Petitioner of valuable protected rights. Further, it strains credibility to believe that Petitioner and the other three hundred and fifty-one former Pan Am pilots who "failed to respond" to the mailed notice (while less than one hundred did respond) would knowingly waive their rights in any settlement the EEOC might secure, unless this failure to respond was

in fact due to actual insufficiency of the notice sent, which failed to inform the addressees that the filing of an EEOC enforcement action would cut off their rights to bring an individual suit under the ADEA.

Moreover, the district court's determination that Petitioner had notice of the instant suit was not specifically based on a finding that the EEOC notice was in fact received by Petitioner. Rather, the court ruled, as CLAIMANTS state, that on "the basis of all this evidence" (CLAIMANTS at p. 15) concerning the media publicity and steps taken by those other than the EEOC (such as another pilot, Ray Egan), Petitioner's claimed lack of knowledge was "incredible." Again, it was impossible for Petitioner to "prove" by independent evidence that he had not been exposed to such

publicity concerning the suit. He could only produce his own testimony, which the court refused to believe, although it was uncontradicted.

The lower court's reliance on general publicity as a substitute for personal notice of the EEOC action violates this Court's insistence on measures reasonably calculated to provide actual notice. This Court has held that mere publication notice is constitutionally deficient, failing to satisfy due process as to persons whose existence is known or reasonably ascertainable. Tulsa Professional Collection Services, Inc. v. Pope, —— U.S. ——, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988). Thus, whatever Ray Egan, PAN AM, the newspapers or broadcast media may have had to say about EEOC's enforcement suit was irrelevant. There was no evidence that Peti-

tioner in fact received such "publication" type of notice; instead the mere existence of third party efforts and media reports was improperly relied on to render Petitioner's claim that he had no prior knowledge of the suit "incredible."

Petitioner submits that the type of inquiry engaged in by the district court virtually invites the EEOC to abandon its constitutional duty to notify victims of age discrimination that their individual claims have been foreclosed by the EEOC's institution of an ADEA enforcement suit. It encourages the EEOC simply to rely on a two-paragraph letter and regular mail to notify all persons whose names appear on a list, secure in the knowledge that any persons who do not receive the notice will never be able to disprove their presumed receipt, and that any news media coverage

of the suit will cause a claimed lack of actual knowledge to be deemed "incredible." Having some vague, generalized knowledge of an ADEA enforcement suit from reports by third parties or the news media simply is not equivalent to receipt of personal notice from the EEOC specifically advising of eligibility to "opt-in" to an EEOC enforcement suit, and that the institution of such a suit cuts off recipient's rights to pursue an individual ADEA remedy.

REPLY TO RESPONDENTS' REASONS FOR DENYING/GRANTING THE WRIT

The preceding reply to Respondents' statements of the case admittedly contains argumentative matter going to the substantive issues raised by these proceedings. Respondents initiated the tactic of set-

ting forth argument in their statements of the case, and in order to keep some semblance of symmetry between this brief and the ones to which it responds, Petitioner was forced to follow suit. Petitioner will now respond to the admittedly argumentative portions of Respondents' brief, although page limits and the number of Responsive briefs involved preclude a strictly point-by-point reply.

One approach taken by Respondents parallels their reliance on the "two-court" rule. Just as Respondents erroneously characterized that rule of judicial review as an absolute bar to this Court's consideration of the lower courts' factual rulings concerning Petitioner's knowledge of the instant suit, they also seek to mischaracterize the role of the EEOC in ADEA enforcement actions.

Respondents, for example, repeatedly cite the same case (three times within the space of four pages) for the proposition that the EEOC is "invested with a heavy (or "large") dose of discretion" in conducting and settling litigation. (PAN AM at pp. 18, 19, bracketed matter supplied), citing, EEOC v. Eastern Air Lines, 97 F.R.D. 646, 650-51 (S.D. Fla. 1983). Whether the EEOC is granted a "heavy" or "large" dose of discretion is not at issue here. The question raised by these proceedings is whether that discretion may be abused by the EEOC by its capricious determinations concerning whether notice will be sent to all, or only some, victims of unlawful age discrimination, whether it will keep records by which it can prove receipt of notice by such victims who it deems deserving of notice, and whether it

will include in any notices sent sufficient information to allow such victims to make an intelligent, informed choice concerning "opting-in."

PAN AM "hits the nail squarely upon its head" when it states it "does not intend to suggest that the EEOC, having terminated individual claims by filing suit, could have settled this case in an arbitrary or capricious fashion . . . without implicating due process concerns. Had it done so, this Court's intervention might well be necessary." (PAN AM at p. 17, n.5). It is hardly surprising that PAN AM does not willingly characterize EEOC's handling of this case as arbitrary and capricious, since PAN AM benefited by not having to settle with all the victims of its discriminatory conduct. Nevertheless, the fact remains that under any objective

view, EEOC's conduct was arbitrary, capricious, and unreasonable.

This conduct is not simply based on reasonable economic or practical considerations. It certainly would not have been unduly burdensome for the EEOC to have mailed a notice that included information indicating that the enforcement suit it described and gave the addressee a chance to opt-into had in fact cut off any other ADEA rights the addressee might otherwise have had. Nor has any explanation, rational or otherwise, ever been given by the EEOC that adequately explains why notice was never sent to numerous pilots, such as Respondent KING, that the EEOC had knowledge of and an address for.

Respondents seek to divert the Court's attention from the true issue -- the EEOC's wilfull disregard of the rights

of victims of age discrimination to notice that the EEOC had undertaken to cut off all their individual ADEA rights -- by claiming that Petitioner is relying on rights of "hypothetical putative claimants" besides himself. (CLAIMANTS at p. 19); see also, (EEOC at 6). This is not a "standing" case, and Petitioner relies on none but his own facts and circumstances before this Court, although perhaps Respondents' arguments in this direction are based on the misguided notion that Petitioner has agreed that he did in fact receive the EEOC's notice, which he has certainly not done.

At any rate, the numerous other pilots who may have never received notice of this suit simply are neither "hypothetical" nor "putative." Several hundred pilots to whom the EEOC purportedly sent

its notice never responded thereto, and without relying on the claims of these other pilots, Petitioner has every right to refer to this fact as evidence of the deficiency of EEOC's notice procedures. Petitioner merely seeks to inform this Court of the scope of the problem the EEOC's practices have caused in the instant case and are apt to continue causing if certiorari is not granted, as to warrant exercise of this Court's jurisdiction to decide "important questions" of unsettled federal law.

Without any analysis of why, or what, distinction should be made between the instant case and Rule 23 class action suits or private ADEA suits, Respondents dutifully point out that these proceedings fall in neither category. (PAN AM at 21-25) (CLAIMANTS at 22). As the Petition

has already pointed out, these differences more strongly mandate that notice must be given, because an EEOC enforcement suit under ADEA cuts off existing rights, yet potential claimants must affirmatively "opt-in" (rather than opt out as under Rule 23) in order to avoid this result.

PAN AM cites the lack of specific notification requirement for EEOC ADEA enforcement suits (PAN AM at 21) and all three Respondents (id. at 24) (EEOC at 8) (CLAIMANTS at 22) rely on the "special remedial scheme" exception stated in a footnote in Martin v. Wilks, —— U.S. ——, 109 S. Ct. 2180, 2184 n.2 (1989), but what all three Respondents gloss over is that even a "special remedial scheme" such as the ADEA must be "otherwise consistent with due process." Id. Thus, whether the ADEA contains a notice provision is ir-

relevant, because the Constitution controls. PAN AM, and CLAIMANTS (by adoption) seek to avoid the patent unconstitutionality of the ADEA's statutory "no notice" scheme by arguing that Petitioner had actual notice by other means (PAN AM at 24-25, 26), but as Petitioner has previously discussed at length, this is erroneous and irrelevant.

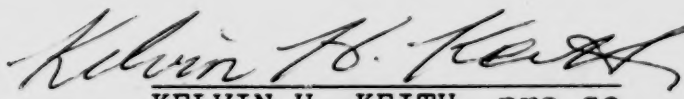
Finally, Respondents seek to excuse the unconstitutionality of the ADEA enforcement scheme by relying on the "self-executing" nature of the statutory scheme. (PAN AM at p. 27) (EEOC at p. 10). As Petitioner has previously (Petition at 49-51) pointed out, however, the ADEA statutory scheme is not "self-executing" the same way statutes of limitation are [the basis for this Court's decisions in Atkins v. Parker, 472 U.S. 115 (1985) and

Texaco, Inc. v. Short, 454 U.S. 516 (1982)], because the "execution" of the statutory scheme is only effected by the conscious decision of the EEOC to file an enforcement suit. No Respondents have even attempted to dispute that this distinction exists, or to argue why it does not render Atkins and Texaco, Inc. inapposite.

CONCLUSION

For the foregoing reasons, and those originally stated in the Petition for Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,



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